United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

77-7105

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

DOCKET NO. 77-7105

- x

OSCAR ROBERTSON, et al.,

Plaintiffs,

- against -

NATIONAL BASKETBALL ASSOCIATION, et al.,

Defendants.

- x

AMERICAN BASKETBALL ASSOCIATION, et al.,

Cross-Claimants,

- against -

NATIONAL BASKETBALL ASSOCIATION, et al.,

Cross-Defendants.

- x

R. T. ECKLES, Trustee in Bankruptcy for Mountain States Sports, Inc., d/b/a/ Utah Stars,

Cross-Claimant-Appellant,

- against -

FREDERICK P. FURTH,

Appellee.

- x

On Appeal From The United States District Court
For The Southern District Of New York

BRIEF FOR CROSS-CLAIMANT-APPELLANT

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On Appeal From The United States District Court
For The Southern District Of New York

BRIEF FOR CROSS-CLAIMANT-APPELLANT

PRELIMINARY STATEMENT

This is an appeal by Cross-Claimant-Appellant, R. T. Eckles, Trustee in Bankruptcy for Mountain States Sports, Inc., d/b/a Utah Stars (hereinafter "Utah Stars")

from an Order of the Honorable Robert L. Carter of the United States District Court for the Southern District of New York, dated and entered on February 24, 1977 (A164)* granting the application of Appellee Frederick P. Furth (hereinafter "Furth") to withdraw as counsel for the Utah Stars with respect to its cross-claim against the National Basketball Association (hereinafter "NBA") for violations of the antitrust laws. There were no findings of fact and conclusions of law filed with the Order and the Order is unreported.

The District Court's Order is a final order and this Court has jurisdiction over this appeal based on 28 U.S.C. §1291.

ISSUE PRESENTED FOR REVIEW

Whether an attorney [Furth] representing multiple parties [American Basketball Association (hereinafter "ABA") and its member teams, including the Utah Stars] pursuant to an agreement for professional services [executed by ABA and the member teams, including the Utah Stars] may be permitted to withdraw from representing certain of such parties [the Utah Stars] because other parties, whom he represented [the

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* Refers to pages of Appendix for Cross-Claimant-Appellant Utah Stars.

ABA and certain of its member teams], have settled with the cross-defendant, NBA, without his advice or counsel, and now assert that as a result of that settlement a conflict of interest has been created which bars the attorney [Furth] from continued representation of a non-settling party [the Utah Stars], thereby effectively destroying the capability of such non-settling party to establish its claims against the NBA.

More particularly, should the District Court's Order granting Furth's withdrawal be reversed because:

1. The withdrawal of Furth is in violation of the Code of Professional Responsibility.

2. The withdrawal of Furth is in violation of his Professional Services Agreement with the Utah Stars.

3. The withdrawal of Furth, pursuant to the assertion by the ABA teams which settled with the NBA that Furth must discontinue his representation of the Utah Stars because of an alleged conflict of interest which the settling ABA teams created by virtue of their settlement with the NBA, effectuates an improper restrictive covenant between the settling ABA teams and the NBA barring Furth's representation in violation of public policy and the Code of Professional Responsibility.

STATEMENT OF THE CASE

Furth was retained by the ABA and various member

teams of the ABA, including the Utah Stars, to represent them in an antitrust cross-claim against the NBA pursuant to an Agreement for Professional Services of January 29, 1974.* This litigation has been heavily pretried involving deposition testimony of 45,000 pages taken from 143 witnesses over 252 days (plus voluminous other discovery) (A158). The docket sheet alone consists of more than 28 typewritten pages reflecting the various activities of the parties to this case.

In the spring of 1976, Robert S. Carlson (hereinafter "Carlson") representing the Long Island Sports (the New York Nets) entered into negotiations with the NBA on behalf of the ABA and certain of its member teams, specifically, the San Antonio Spurs, Denver Nuggets, Indiana Pacers and the New York Nets. Furth was not present at and did not participate in the settlement discussions (A16-17, A7-8) and his clients, Denver Nuggets, Indiana Pacers and San Antonio Spurs and the ABA, elected to be represented by Carlson and not Furth. Not only was Furth not involved in the negotiations, but his client, the Utah Stars, was neither invited to participate in the negotiations nor advised of the nature of the negotiations and the terms

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* A copy of which is filed herewith as Exhibit A to the Brief for Cross-Claimant-Appellant Utah Stars.

thereof.

After he had reached an agreement in principle with the NBA, Carlson advised Furth that as a result of the nature of the compromise of the litigation reached between the four settling ABA teams and the ABA, on the one hand, and the NBA on the other hand, Furth "could no longer represent plaintiffs in this action nor any of the cross-claimants in Robertson". Carlson further advised Furth that "a conflict of interest had been created by settlement of the Robertson cross-claims" (A8, A16-17, A116-117) and "instructed Mr. Furth on behalf of my clients to take no further action" (A17).

Notwithstanding the fact that neither the Utah Stars nor Furth participated in the settlement negotiations; that the Utah Stars legal position vis-a-vis the NBA has at all times been the same, namely, that the NBA's activities were illegal and in violation of the antitrust laws resulting in the destruction of the business and commerce of the Utah Stars in the business of professional basketball, the District Court granted the petition of Furth to withdraw as counsel for the Utah Stars. The result of the District Court's Order is that the Utah Stars are faced with the loss of counsel in a heavily pretried case which is close to trial, and in view of their financial condition, such withdrawal is tantamount to destroying the cause of action of the Utah

Stars against the NBA. The cost of obtaining counsel to familiarize themselves with the extensive record, to complete pretrial and trial would be well in excess of $200,000 and clearly beyond the means of the Utah Stars (A152).

The settling ABA teams have, in effect, by reason of the terms of their settlement with the NBA, entered into a covenant* with the NBA restricting Furth from continued representation of the Utah Stars in the antitrust action of the Utah Stars against the NBA. The NBA is a direct beneficiary of this covenant. By virtue of Furth's withdrawal, the Utah Stars' ability to litigate its claims is at present totally emasculated. Where multiple parties agree to be represented by a single counsel, there is no basis for permitting any one or more of those parties who specifically decide to settle their action to bar the continued representation of counsel as to the remaining parties. Yet, these are the clearly improper effects of the Order below granting the petition of Furth to withdraw as counsel for the Utah Stars.

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* This covenant is reflected in the provision of the settlement which makes the ABA settling teams jointly liable with the NBA for any damages recovered by the Utah Stars in the further prosecution of its antitrust cross-claim against the NBA (A8, A16-17, A116-117); in Carlson's direction to Furth to take no further action in the litigation on behalf of the Utah Stars because of the alleged conflict of interest created by the settlement, supra, p. 5, and in Furth's filing of the petition to withdraw.

As we will show below, neither the Code of Professional Responsibility nor the very terms of Furth's Agreement for Professional Services of January 29, 1974 with the ABA and its various member teams, including the Utah Stars, permits Furth's withdrawal. Further, the requirement by the settling ABA teams that Furth discontinue his representation of the Utah Stars because of an asserted conflict of interest arising out of the settlement with the NBA by such teams has the force and effect of an improper and impermissible restrictive covenant, preventing counsel from continued representation in violation of public policy and the Code of Professional Responsibility.

POINT I.

THE CODE OF PROFESSIONAL RESPONSIBILITY BARS FURTH'S WITHDRAWAL FROM THIS ACTION

At the time Furth agreed to represent the ABA and its member teams, including the Utah Stars, there was a commonality of interest among all his clients. They believed that they had been harmed by various acts of the NBA in violation of the antitrust laws for the various reasons set forth in the pleadings in this action. In his Agreement for Professional Services Furth received: (1) a retainer fee (see Paragraph 2(a) of Exhibit A); (2) an arrangement for a contingency fee of one-third of all monetary recoveries by his clients (see Paragraph 2(b) of Exhibit A); (3) a discon-

tinuance fee which would come into operation if any of his clients dismissed or discontinued their actions (see Paragraph 2(c) of Exhibit A); and (4) a non-monetary recovery fee which would take effect upon 5 or more of the then current ABA member teams becoming associated in the league with 8 or more of the then current NBA member teams (see Paragraph 2(d) of Exhibit A) as well as all expenses incurred by Furth in the conduct of the litigation (see Paragraph 3 of Exhibit A).

At the time that this agreement was executed, it was clear that for certain teams which were in financial trouble and might be out-of-existence before the litigation was complete, the only meaningful relief for them was monetary damages as to which Furth agreed to a one-third contingency fee and as to the other teams, among the types of relief which might remedy their damages, would be an association with the NBA teams for which result Furth would also receive a fee. Now that certain of the ABA teams, namely, those which have settled with the NBA by joining with it, have obtained their desired result, Furth seeks to avoid his continuing professional and contractual responsibilities to the remaining teams by withdrawing from representing them. This Court should not countenance such a clear violation of Furth's professional responsibilities to the Utah Stars.

At no time has Furth changed his position in the

litigation vis-a-vis the NBA. From 1974 when he was retained by the ABA and its member teams, including the Utah Stars, until the District Court's Order was entered, Furth represented parties complaining of antitrust violations by the NBA. However, it is now contended that because certain of his former clients saw fit to discontinue their litigation with the NBA, Furth is barred from continued representation of the Utah Stars. This argument is made because of an alleged indemnification agreement by which the ABA teams that joined the NBA agreed to indemnify the NBA for any judgment which might be entered as a result of the cross-claim here litigated by the Utah Stars (A8, A16-17, A116-117). Since the settlement effected by certain of the ABA teams, it is the understanding of the Utah Stars that Furth has been discharged by those clients and no longer represents them (A17).

In his continued representation of the Utah Stars, Furth maintains the same position vis-a-vis the NBA that he maintained on behalf of the ABA and its member teams at the time he executed his employment agreement, January 29, 1974, Exhibit A, namely, that the activities of the NBA and its member teams are illegal and in violation of the antitrust laws in their destruction of the business and commerce of the Utah Stars in the business of professional basketball.

In this case Furth has done nothing to alter the

capacity in which he performs his professional duties. He has done nothing by virtue of any action to create or participate in the creation of any conflict of interest with respect to his professional retainer. He initially undertook the representation of parties prosecuting private antitrust claims against the NBA and in the continued representation of the Utah Stars he merely continues such representation. If the settlement agreement between certain of the ABA teams and the NBA can be said to have created a conflict of interest, such conflict results from the activities of the settling parties and not Furth. These clients have expressly and by their conduct in effectuating such a settlement waived any right to protest Furth's continued representation of the remaining cross-claimants. See 52 A.L.R.2d 1246, 1270-1274.

On the papers presently before the Court in connection with this appeal, it is clear that Furth neither participated in nor counselled the settling ABA teams in connection with the settlement negotiations. Thus, it was not on his advice and counsel that any alleged conflict arose. Clearly, if this is the case, Furth has engaged in no activity which is remotely similar to the impropriety contemplated by Canon 6, which in relevant part states:

> "The obligation to represent the client with undivided fidelity and

> not to divulge his secrets or confidences forbids also the subsequent acceptance of retainers or employment from others in matters adversely affecting any interest of the client with respect to which confidence has been reposed." (Opinions on Professional Ethics, American Bar Association, 1967 Edition, p. 22.)

From the time he was retained, Furth accepted no employment or retainer in any matter adversely affecting the interest of his clients in their suit against the NBA. Until the Order of the Court below was entered, he was simply continuing to fulfill his professional obligations to the Utah Stars under his retainer agreement of January 29, 1974.

Further, it is inconceivable that the activities of the settling parties could be used to assign such impropriety to the continuation of Furth's representation of the Utah Stars as Carlson appears to do in his direction to Furth to take no further action herein on behalf of the Utah Stars (A16-17). To conclude otherwise would subordinate Furth's professional responsibility to the compromising influence of third parties in violation of the Code of Professional Responsibility, Canon 5, Ethical Considerations 5-1 and 5-21. Ethical Consideration 5-1 states:

> "EC 5-1. The professional judgment of a lawyer should be exercised within the bounds of the law, solely for the benefit of his client [Utah Stars] and free of compromising influences and loyalties. Neither his personal interests, the interests of other clients [former ABA teams which settled with

> the NBA], nor the desires of third persons [former client ABA teams which settled with the NBA and the NBA itself] should be permitted to dilute his loyalty to his client [Utah Stars]."

If for the price of settlement, the NBA was allowed to impose as a condition of settlement the indemnification by the ABA teams and as a result of such settlement and indemnification the NBA and settling ABA teams are now able to deprive the Utah Stars of their representation by Furth, then clearly Furth's withdrawal would have been influenced by the third parties in violation of Ethical Consideration 5-1, and would not merely dilute his loyalty to his client the Utah Stars, but would end it entirely. If, as alleged by both Furth and Carlson, Furth in no way participated in the settlement negotiations, there is nothing which impairs the effectiveness of his continued representation of the Utah Stars in this litigation.

In connection with the action by the Utah Stars against the NBA, the only violations of the antitrust laws arise from the activities of the NBA and its member teams. No attempt has been made by the Utah Stars to amend its cross-claim to join the ABA teams which settled or to charge them with antitrust violations for having executed the indemnification agreement. In Formal Opinion No. 165*

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* A copy of which is filed herewith as Exhibit B to the Brief for Cross-Claimant-Appellant Utah Stars.

of the American Bar Association, it has been held proper for counsel to continue to represent remaining plaintiffs where certain of the plaintiffs have, as here, discontinued their action against a defendant. In summary, the Opinion states:

> "An attorney for several co-plaintiffs may name one of them, who wishes to discontinue litigation, as a co-defendant simply for the purpose of bringing him before the court as a necessary party if the attorney does not seek affirmative relief against such party and if by so doing he will not be compelled to disclose confidential communications. The attorney may seek to recover compensation for his professional services rendered to such a withdrawing client." (Formal Opinion No. 165, Opinions of the American Bar Association, 1967 Edition, pp. 434-435.)

Such a result is essential where multiple parties have agreed to be represented by a single counsel. If at any point in a litigation certain of the parties were to decide to discontinue their action by settlement or otherwise with the defendants, and could thereafter bar the continued representation by counsel of the remaining parties, it would result in great economic deprivation to the other parties, and as in the case of the Utah Stars here, have the potential to destroy its cause of action. If the Order of the District Court is permitted to stand allowing Furth's withdrawal under the circumstances of this case, it is a dangerous precedent for future private antitrust litigations. Because of the

great expense in prosecuting antitrust actions, involving as they do a myriad of facts and extensive discovery, it has become quite common for many parties to ban together and retain a single counsel for prosecution of their causes of action. If a defendant could effect a settlement with certain of those plaintiffs in a manner similar to that here involved, so as to raise a spurious conflict of interest through the mechanism of an indemnification agreement, joint venture agreement or otherwise, defendants in antitrust actions would be able to destroy the economic capability of non-settling plaintiffs to prosecute their antitrust actions. All that would be necessary would be to seek out those of the multiple plaintiffs in the best financial condition, offer them a desirable settlement, and then have those settling parties block the continued representation of the counsel who had been retained by all the parties, through the assertion of an alleged conflict of interest. The Court should reverse the Order below granting Furth's motion to withdraw and thereby prevent a clearly improper avoidance of Furth's responsibility to the Utah Stars under the Code of Professional Responsibility.

POINT II.

FURTH'S WITHDRAWAL FROM REPRESENTATION OF THE UTAH STARS IS A BREACH OF HIS AGREEMENT FOR PROFESSIONAL SERVICES

If Furth withdraws from this litigation, he will

have explicitly breached the provisions of his Agreement of Professional Services of January 29, 1974 with the Utah Stars and others. The agreement, an extremely complex document, provided for an initial retainer of $100,000, contingency recovery of one-third all monetary damages, an involved fee schedule depending upon discontinuance of certain of the actions, and payments in the event merger was effectuated. In addition to that, it provided reimbursement of expenses attendant to participation in the litigation, travel, costs of transcripts, etc. Although the parties explicitly recognized that the litigation might terminate by virtue of a discontinuance of certain of the actions against the NBA by settlement, they made no effort to define the impact of such settlement upon Furth's continued representation of non-settling parties such as the Utah Stars, nor did they provide any basis for such settling teams to object to Furth's continuance in the litigation. As a result, Furth is bound to pursue the remaining interests of the Utah Stars and the ABA teams which settled have no right to object to his continued representation of the Utah Stars.

Apparently, Furth has been substantially enriched as a result of the partial settlement even though he allegedly took no part in the negotiations thereof. It is reported that Furth's fees to date are in the order of 1.3 million

dollars (A152). Furth may well have had the right to fees in this amount pursuant to the terms of his agreement, Exhibit A, but nothing in that agreement barred him from his continued representation or permitted him to remove himself from his contractual obligation to continue this litigation on behalf of the Utah Stars. Because of the advanced state of this litigation, it is recognized by all the parties, including the NBA, whose counsel has noted the extensive nature of the discovery had herein, supra, p. 4, that finding new counsel at this time would be an extremely costly procedure. This alternative is one clearly outside the means of the bankrupt Utah Stars. If Furth is permitted to withdraw by this Court as a result of the settlement, then Furth, who has accepted a substantial fee in connection therewith, should only be permitted to withdraw if the Utah Stars are compensated by him in an amount that will be necessary for competent counsel to become familiar with and complete discovery and try this case to a jury.* This is a measure of the damage to the Utah Stars for Furth's failure to complete performance of professional services pursuant to the agreement, Exhibit A hereto.

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* Such a cost is estimated to be in excess of $200,000 (A152).

POINT III.

THE ASSERTION BY THE SETTLING ABA TEAMS THAT FURTH MUST DISCONTINUE HIS REPRESENTATION OF THE UTAH STARS BECAUSE OF AN ALLEGED CONFLICT OF INTEREST THAT THEY CREATED BY VIRTUE OF THE TERMS OF THEIR SETTLEMENT WITH THE NBA, IS AN ATTEMPT TO IMPRESS A RESTRICTIVE COVENANT UPON FURTH BARRING HIS REPRESENTATION OF THE UTAH STARS IN VIOLATION OF PUBLIC POLICY AND THE CODE OF PROFESSIONAL RESPONSIBILITY

As noted above, at the time Furth was retained by the ABA and its member teams, including the Utah Stars, there was a commonality of interest among the parties in respect of their position concerning violations of the anti-trust laws by the activities of the NBA and its member teams. In the spring of 1976, certain of the ABA teams settled with the NBA upon terms and conditions which the settling ABA teams now assert create a conflict of interest barring Furth from continued representation of the Utah Stars. Furth states that such conflict arises out of an alleged indemnification agreement required by the NBA from the ABA before such settlement could be effected (A8). Carlson, counsel for the settling ABA teams and the ABA, asserts that such conflict of interest arises also from the terms of the settlement and by virtue of the joint venture agreement by which the settling teams became members of the NBA (A16-17, A116-117).

The ABA settling teams are asserting that in connection with the settlement of their action with the NBA,

there were imposed and they agreed to terms and conditions the effect of which is to impress a covenant upon Furth barring his continued representation of the Utah Stars in pursuit of its antitrust claims against the NBA and its member teams. It is well established that the NBA could not have imposed as a condition to the settlement by the ABA teams with the NBA, an express agreement that Furth not represent other third parties in any antitrust claims they might have against the NBA and its member teams. Yet, the assertion by the ABA settling teams that the terms of the settlement create a conflict of interest which bars his continued representation of the Utah Stars has the same force and effect as if such express restrictive covenant had been imposed by the NBA on the settling ABA teams.

One District Court Judge has noted that such restrictive covenants are improper. In an article entitled "Negotiation and Judicial Scrutiny of Civil and Criminal Antitrust Cases", 70 F.R.D. 495, Judge Charles B. Renfrew of the Northern District of California stated:

> "For example, at one time it was rather common in the settlement of antitrust treble-damage actions for defendant's counsel to require plaintiff's counsel to agree not to represent other plaintiffs in similar actions against the same defendant. Today such provisions are no longer found in settlement agreements, because they are contrary to public policy in that they unnecessarily restrict members of the public from obtaining specially qualified counsel."

Considerations in connection with such settlement covenants are treated extensively in an article in Catholic University Law Review, Vol. 18,* which states at pp. 415-416:

> "The plaintiff's attorney. The attorney has the right to determine what cases he will accept, but the attorney with present clients has a duty to refrain from any action which may jeopardize their interests. The plaintiff's attorney owes a duty to his clients not to restrain the availability of his services. The attorney without present duties to the interests of other clients or potential clients still has a duty to his profession to refrain from illegal acts; this duty may extend to refraining from such covenants as the one under discussion."

Finally, the American Bar Association in Informal Opinion No. 1039**, at p. 226, has condemned any provision which would have that force and effect and which would result as here in Furth's abandonment of his obligation to represent

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* "Attorneys' Settlement Covenants Not to Accept Future Cases: Antitrust and Ethical Considerations", Vol. 18, Catholic University Law Review, 412 (1969). A copy is attached as Exhibit C to the Brief for Cross-Claimant-Appellant Utah Stars.

** Informal Opinion No. 1039 of the American Bar Association, entitled "Can a Lawyer Ethically Sign an Agreement Which Settles his Client's Litigation when the Settlement Agreement Contains a Covenant that he Will Not Represent Other Plaintiffs against the Defendant". A copy is attached as Exhibit D to the Brief for Cross-Claimant-Appellant Utah Stars.

the Utah Stars, stating:

> "Because of the foregoing it is improper for the attorney representing the defendants to demand this kind of a covenant and by way of corollary it is improper for plaintiffs' attorney to abandon the interests of other clients, who have depended upon his services through periods that may be invaluable and of long standing."

POINT IV.

WHERE MULTIPLE PARTIES AGREED TO REPRESENTATION BY A SINGLE COUNSEL, DISCONTINUANCE OR SETTLING BY CERTAIN OF THOSE PARTIES CANNOT BAR COUNSEL FROM REPRESENTING THE REMAINING PARTIES BECAUSE OF AN ALLEGED CONFIDENTIAL RELATIONSHIP WITH THE SETTLING PARTIES

The principle which bars an attorney from representing an interest adverse to his former client is founded upon the confidential relationship which exists between the attorney and client (52 A.L.R.2d 1243, 1250). However, this general principle is subject to specific limitations and qualifications. The rule is inapplicable where, for example, the information conveyed by the former client was removed from the operation of the attorney-client privilege due to the presence of a third party. Thus, the foundation for disqualification of an attorney for representation of any interest adverse to a former client is the existence of a confidential relationship between the attorney and the former client. No such relationship exists where multiple parties, having a common interest and position, have agreed

to representation by a single counsel as was the case with Furth's retainer by the ABA and its member teams, including the Utah Stars.

In the case of G.C. Croce v. The Superior Court of the City and County of San Francisco, 21 Cal. App.2d 18, 68 P.2d 369 (1st District Court of Appeals 1937),* the Court was presented with the question of whether an attorney who had represented several clients associated in a business enterprise in defense of an action involving their common interest wherein it was denied that a partnership existed between them, was disqualified from afterward representing one of those former clients as plaintiff in subsequent litigation instituted against his associates wherein it was alleged that a partnership did exist between them. Plaintiff's former associates argued for disqualification on the basis of confidential information acquired while representing all the parties in the former litigation. The former associates stated that the information was relevant to the determination of the later litigation and suggested that its use would be prejudicial to their common interests (21 Cal. App.2d at 19). In rejecting this contention the Court, citing Thornton on Attorneys at Law, stated that (21 Cal. App.2d 19):

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* A copy of the opinion is filed herewith as Exhibit E to the Brief for Cross-Claimant-Appellant Utah Stars.

> "When two or more clients employ the same attorney in the same business, communications made by them in relation to such business are not privileged inter sese; nor are such communications privileged as between any one of the parties and the attorney. It is the secrets of the client which affect his right that the law does not permit the attorney to divulge. By selecting the same attorney, and making their communications in the presence of each other, each party waives his right to place those communications under the shield of professional confidence."

Having failed to establish the existence of a confidential relationship because of the representation of multiple parties with the agreement of all, the objecting parties were unable to prevent the representation of their former counsel on behalf of their former colleague.

And in Petty v. Superior Court, 116 App. Cal.2d 20, 253 P.2d 28 (2d District Court of Appeals 1953),* the California court held that where two persons employ the same attorney to represent them as their common agent in a particular transaction, communications made to the attorney by either in the other's presence are privileged as to strangers but not to the parties who agreed to the representation, and the attorney is not barred from representing one

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* A copy of this opinion is filed herewith as Exhibit F to the Brief for Cross-Claimant-Appellant Utah Stars.

of the persons in an action against the other which involves the same documents. See also, Arden v. State Bar of California, 52 C.2d 310, 318-319, 341 P.2d 6, 11 (Sup.Ct. of Calif. 1959) and Nichols v. Elkins, 408 P.2d 34, 39, 2 Ariz. App. 272 (Ct. of Appeals of Arizona 1966),* both following the Petty and Croce decisions.

Thus, if in California where Furth is admitted to practice, he would be permitted to represent one of the ABA teams against the others in a subsequent litigation, where in the former litigation they had all agreed to his representation; then clearly, Furth must be permitted and in fact directed to continue in this matter on behalf of the Utah Stars. Here, Furth is merely continuing in the litigation in which all parties to the litigation initially agreed to be represented by him. Further in this continuing litigation on behalf of the Utah Stars, there are no charges by the Utah Stars against the cross-claimant ABA teams who settled with the NBA and formerly retained him. Furth is simply continuing his representation of the Utah Stars which has never been terminated.

CONCLUSION

It is respectfully submitted that the District

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* Copies of these opinions are filed herewith as Exhibit G and H to the Brief for Cross-Claimant-Appellant Utah Stars.

Court's Order granting Furth's withdrawal as counsel for the Utah Stars: (1) is contrary to Furth's obligation to the Utah Stars under the Code of Professional Responsibility; (2) is contrary to the terms of his agreement with the Utah Stars for professional services; (3) effectuates an improper restrictive covenant between the settling ABA teams and the NBA barring Furth's representation of the Utah Stars in violation of public policy and the Code of Professional Responsibility; and (4) emasculates the ability of the Utah Stars to prosecute its antitrust cause of action against the NBA. For each of these reasons it is respectfully submitted that the decision of the District Court be reversed.

Respectfully submitted,

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